IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 26, 2006 Session

RICHARD E. HUBER ET AL. v. ROBERT CALLOWAY ET AL.

Appeal from the Chancery Court for Wilson County
No. 04123 C.K. Smith, Chancellor

No. M2005-00897-COA-R3-CV - Filed on July 12, 2007

This appeal involves a dispute arising out of the attempted exercise of an option to purchase a tract of farmland in Wilson County. The option provided that the parties would agree upon a purchase price when the purchasers exercised the option. When the purchasers attempted to exercise the option, their neighbors refused to permit them to have the property appraised in order to establish a purchase price. Accordingly, the purchasers filed suit in the Chancery Court for Wilson County requesting that their neighbors be compelled to allow an appraisal of the property and to enjoin them from improving the property while the dispute was pending. The trial court required the neighbors to allow the appraisal, and the purchasers offered their neighbors the appraised value of the property. When the neighbors refused to sell the property, the purchasers amended their complaint to allege breach of contract and misrepresentation. The trial court heard the case without a jury, directed the clerk and master to obtain an independent appraisal of the property, and ordered the neighbors to sell the property to the purchasers at the newly appraised value of the property. We have determined that the parties' option agreement is not an enforceable contract and, therefore, we reverse the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and JERRY SCOTT, SR. J., joined.

Gary Vandever, Lebanon, Tennessee, for the appellants, Robert Calloway and Carol G. Calloway.

David B. Foutch, Lebanon, Tennessee, for the appellees, Richard E. Huber and Debra L. Mase.

OPINION

I.

In 2002, Richard E. Huber and Debra L. Mase became interested in purchasing a large amount of acreage in Wilson County. They focused their attention on a farm and house owned by Virginia H. Reeve ("Reeve property") which was listed for sale by Carol G. Calloway. As it turned out, Ms. Calloway and her husband, Robert Calloway, owned the property surrounding the Reeve property on three sides. During the discussions regarding the purchase of the Reeve property, Ms.

Mase and Mr. Huber expressed an interest in purchasing the Calloways' property, and the Calloways indicated their willingness to sell.

Ms. Mase and Mr. Huber subsequently entered into a contract to purchase the Reeve property, but the agreement was expressly conditioned on the Calloways' willingness to sell them one of the adjacent tracts immediately and to give them the right of first refusal to purchase the remaining two adjacent tracts. The Calloways were not parties to the contract for the Reeve property, but Ms. Calloway signed it as the listing agent for the seller's real estate company.

The closing on the Reeve property took place on December 12, 2002. On that date, Mr. Huber and Ms. Mase and the Calloways signed a purchase agreement for two of the surrounding tracts. They also signed an option agreement drafted by Mr. Huber permitting Mr. Huber and Ms. Mase to purchase the third tract – which included the Calloways' house – at any time during the next five years, upon six months written notice to the Calloways. Rather than setting a purchase price for the third tract, the parties included the following provision in the option:

> In lieu of attaching purchase agreement, Buyer and Seller agree to complete an agreement at time of notice to sell. Purchase price to be mutually agreed upon based on independant [sic] appraisal at time of notice to sell.

As consideration for the option, Mr. Huber and Ms. Mase agreed to pay the Calloways an annual fee of $500 to be credited to the purchase price or forfeited in the event that Mr. Huber and Ms. Mase failed to execute an agreement to purchase the property. The option agreement also gave the Calloways the right to force Mr. Huber and Ms. Mase to purchase the property on six months' written notice.

On December 2, 2003, Mr. Huber and Ms. Mase sent a letter informing the Calloways of their intent to exercise their option to purchase the final tract. The letter requested a closing date between June 1 and September 1, 2004 and suggested that both sides engage appraisers and that the purchase price be determined by averaging the appraisals. The Calloways, apparently without the knowledge of Mr. Huber and Ms. Mase, had an appraisal completed on December 19, 2003, which determined that the value of the property was $230,000.

On March 25, 2004, Mr. Huber and Ms. Mase filed suit in the Chancery Court for Wilson County, alleging that the Calloways had cancelled four different appointments with their appraiser and that the Calloways were making improvements to the property in an attempt to increase its value prior to the sale. Mr. Huber and Ms. Mase asserted that this conduct amounted to an anticipatory breach and repudiation of the option agreement, and they requested a temporary restraining order prohibiting further improvements. They also filed a separate motion requesting the trial court to order an immediate appraisal of the property. On April 6, 2004, the trial court entered an order requiring the Calloways to allow Mr. Huber's and Ms. Mase's appraiser to visit the property and restraining the Calloways from making further improvements to the property pending further orders by the court.

On May 13, 2004, Mr. Huber's and Ms. Mase's appraiser valued the Calloways' house and land at $156,000. Two weeks later, the Calloways offered to sell the property for $267,000. On June 25, 2004, Mr. Huber and Ms. Mase filed an amended complaint, alleging breach of contract and misrepresentation. They requested the court to direct the Calloways to sell the property to them at a price established by an independent appraisal or the court's own determination. In the alternative, they requested rescission of their original purchase agreement for the Reeve property, the purchase agreement with the Calloways for the first two tracts of their land, and the option agreement for the purchase of the third tract.

The parties proceeded to a bench trial on November 10, 2004. The primary issue at trial concerned whether the option agreement had clearly established the procedure by which the purchase price would be established. During the trial, both Mr. Calloway and Mr. Huber testified as to their interpretations of the language "to be mutually agreed upon" and "based on independant [sic] appraisal." On January 4, 2005, the trial court entered an order directing the clerk and master to obtain an independent appraisal of the property and requiring the Calloways to sell the property to Mr. Huber and Ms. Mase for the amount of that appraisal. The appraiser chosen by the clerk and master valued the property at only $97,000. On February 2, 2005, the Calloways filed a motion for a new trial or to alter or amend the January 4, 2005 order. The trial court entered an order denying the motion on March 1, 2005. The Calloways have appealed.

II.

The standards this court uses to review the results of bench trials are well-settled. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). If, however, the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000), and questions regarding the interpretation or construction of a written contract are questions of law. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 335-36 (Tenn. 1983); *Atkins v. Atkins*, 105 S.W.3d 591, 594 (Tenn. Ct. App. 2002).

III.

The Calloways contend that the language in the option agreement requiring the parties to establish a mutually agreed upon price is merely an "agreement to agree" and, therefore, unenforceable as a contract. Mr. Huber and Ms. Mase, on the other hand, assert that the determinative language in the contract is the phrase "based on independant [sic] appraisal" and that this language reflects that the parties had conclusively agreed on the mechanism by which the purchase price would be set. We find that the Calloways have the better argument.

The difference between a valid contract and an unenforceable agreement requires consideration of two related concepts: an expression of the parties' intent to be bound, and the definitiveness with which they state their terms. *See Higgins v. Oil, Chem. & Atomic Workers Intern. Union*, *Local No. 3-677*, 811 S.W.2d 875, 881 (Tenn. 1991); *Wolvos v. Meyer*, 668 N.E.2d 671, 675 (Ind. 1996); Restatement (Second) Contracts § 33, at 92 (1981); 1 Joseph M. Perillo, *Corbin on Contracts* § 2.8, at 131 (rev. ed. 1993) (*Corbin on Contracts*). The courts' initial task is to determine whether the written contract is ambiguous. If the contract's language is plain and complete, the contracting parties' intentions must be gathered from the language of the contract alone. Accordingly, when the parties have reduced their contract to writing, their intentions should be contained in the four corners of the contract, *BVT Lebanon Shopping Ctr., Ltd. v. Wal-Mart Stores, Inc.*, 48 S.W.3d 132, 135 (Tenn. 2001); *Whitehaven Comty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998), and the contracting parties' rights and obligations should be governed by their written contract. *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d 678, 681 (Tenn. Ct. App. 1999).

Intent is revealed through an examination of the language chosen by the parties. *City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. v. Humphrey*, 126 S.W.3d 897, 903 (Tenn. 2004). This standard is an objective one, and the courts must determine intent by examining the meaning that a reasonable person would have derived from the words had such person been in the same situation as that of a party to the contract. *Hardwick v. American Can Co.*, 113 Tenn. 657, 670, 88 S.W. 797, 801 (1905); *Moore v. Moore*, 603 S.W.2d 736, 739 (Tenn. Ct. App. 1980). The rules of contract construction come into play only when the court determines that the contract is ambiguous or incomplete. *Planters Gin Co. v. Federal Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002). Contractual ambiguity arises only when contractual provisions may reasonably be read to have more than one meaning. *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001); *Williams v. Berube & Assocs.*, 26 S.W.3d 640, 643 (Tenn. Ct. App. 2000). It does not arise simply because the contracting parties interpret their contract differently. *Johnson v. Johnson*, 37 S.W.3d at 896; *Simonton v. Huff*, 60 S.W.3d 820, 825 n.3 (Tenn. Ct. App. 2000). Thus, in the absence of fraud or mistake, the courts should construe unambiguous written contracts as they find them. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 223 (Tenn. Ct. App. 2002); *Willis & Willis, L.P. v. Gill*, 54 S.W.3d 283, 286 (Tenn. Ct. App. 2001).

Contracts that leave material terms open for further negotiations are generally too vague to be enforceable. *See, e.g., Four Eights, LLC v. Salem*, 194 S.W.3d 484, 487 (Tenn. Ct. App. 2005) (reiterating that an "agreement to agree" is generally unenforceable); *Gurley v. King*, 183 S.W.3d

30, 35 (Tenn. Ct. App. 2005); *Engenius Entertainment, Inc. v. Herenton*, 971 S.W.2d 12, 18 (Tenn. Ct. App. 1997); Restatement (Second) Contracts, § 27 cmt (b), at 79; 1 *Corbin on Contracts* § 2.8, at 134 ("[T]he so-called 'contract to make a contract' is not a contract at all."). However, the law does not favor the destruction of contracts, and a contract that lacks definitiveness of terms will be enforced if the terms can be reasonably ascertained from the language of the contract. *See Four Eights, LLC v. Salem*, 194 S.W.3d at 487; 1 Samuel Williston, *Treatise on the Law of Contracts*, § 4:27, at 593-601(Richard A. Lord, ed. 4th ed. 1990); 21 Steven W. Feldman, *Tennessee Practice: Contract Law and Practice* § 4:11, at 290 (2006). Accordingly, where price is the unspecified material term, courts have enforced contracts that call for the price to be set by vague but ascertainable standards, such as "market price" or "prevailing rate" *See, e.g., D.R. Vivian Mfg. Co.*, v. *Robertson*, 75 S.W. 644, 645 (Mo. 1903); *Toys, Inc. v. F.M. Burlington Co.*, 582 A.2d 123, 126 (Vt. 1990).

Contract provisions should be considered in the context of the entire contract. *D & E Constr. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518 (Tenn. 2001); *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999). In addition, the language used in a contract should be given its natural and ordinary meaning. *Planters Gin Co. v. Federal Compress & Warehouse, Inc.*, 78 S.W.3d at 889-90; *Evco Corp. v. Ross*, 528 S.W.2d 20, 23 (Tenn. 1975); *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d at 681. The courts should avoid strained constructions of contractual language that create contractual ambiguities where none, in fact, exist. *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975); *Empress Health & Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190-91 (Tenn. 1973).

The courts should also avoid rewriting contracts for parties who have spoken for themselves and should avoid relieving parties from their contractual obligations simply because these obligations later prove to be burdensome or unwise. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d at 223; *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d at 682. In addition, the courts should maintain neutrality between the parties unless they determine that a particular contractual provision is ambiguous. *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d at 598; *Heyer-Jordan & Assocs., Inc. v. Jordan*, 801 S.W.2d 814, 821 (Tenn. Ct. App. 1990). However, if the court determines that a contractual provision is ambiguous, it should construe the provision against the party responsible for drafting it. *Hanover Ins. Co. v. Haney*, 221 Tenn. 148, 153-54, 425 S.W.2d 590, 592-93 (1968); *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d at 682.

Mr. Huber and Ms. Mase vigorously maintain that the phrase "based on independant [sic] appraisal" reflects the parties' intention to set the selling price firmly at the price arrived at by a real estate appraiser. Although the language lacks specificity, it is not inconceivable that it could be of such a definite nature as to be enforceable if it stood alone. *See Graham County Elec. Cooperative, Inc. v. Town of Safford*, 322 P.2d 1078, 1080-81 (Ariz. 1958); *Hanna v. Bauguess*, 430 A.2d 104, 108-09 (Md. 1981). Far from standing alone, however, the vague language is juxtaposed with language that is crystal clear – "price to be mutually agreed upon"– the plain, unambiguous meaning of which is that the parties will complete their transaction only after they each agree on the selling price.

Although "based on independant [sic] appraisal" may have several plausible interpretations, the only possible meaning of the contract's language, in the context of the entire agreement, is that the parties agreed to open negotiations in the future regarding the purchase price of the land and that those negotiations would result in a sale only if the parties reached an agreement on price. *See Four Eights, LLC v. Salem*, 194 S.W.3d at 487. While it is beyond doubt that the parties envisioned that an independent appraisal would be incorporated into this process, any uncertainty in the language mandating an appraisal does nothing to change the requirement of mutual agreement.

Mr. Huber and Ms. Mase ask us to ignore the clear language requiring mutual agreement and impose in its place their own interpretation of "based on independant [sic] appraisal." This we cannot do. The facts of this case do not present a situation in which the parties have agreed to an indefinite but ascertainable price. Neither have the parties explicitly agreed to a "reasonable" price derived from an appraisal. The clear implication is that the parties intended that a price would be negotiated in the future. This is perhaps a classic example of the "agreement to agree." *See* 1 *Corbin on Contracts* § 4.3, at 572. Construing the parties' agreement as a whole, it is apparent that option agreement is not sufficiently definite to constitute a contract.[1]

The parties submitted parol evidence to the trial court, and neither party objected to the other's submission thereof. Because we have determined that the plain language of the contract evidences the parties' intent to reopen negotiations at some point in the future, our decision was reached without consideration of the parol evidence. *See Jones v. Brooks*, 696 S.W.2d 885, 886 (Tenn. 1985); *Moore v. Moore*, 603 S.W.2d at 739. Had we had occasion to consider the parol evidence, we would have reached the same conclusion.

Mr. Calloway's testimony merely confirmed the plain meaning of the agreement. Mr. Calloway also explained that the "mutually agreed upon" language was inserted at his insistence due to his intention to retain negotiating power over the purchase price. Mr. Huber, on the other hand, sought to explain the meaning of the imprecise wording "based on independant [sic] appraisal." He insisted that by this language, which he himself had drafted, the parties manifested their intent to set the price of the property to equal the appraisal price. However, Mr. Huber referred to the "based on" language as a mistake, and he stated that if he were a real estate agent or an attorney, he "would more than likely have caught that [the mistake]." Mr. Huber's attempt to assert the "I said one thing but meant another" argument simply cannot prevail over the plain language of the agreement indicating that the parties had not yet concluded their negotiations as to price. "The fact that one party unilaterally conceived a peculiar meaning not shared by the other party will not avail to disturb the plain and ordinary meaning of the words of the contract." *Moore v. Moore*, 603 S.W.2d at 739.

[1] The December 2, 2003 letter is relevant to this inquiry only insofar as it confirms that the language of the contract was indefinite. While the Calloways could have accepted this offer and thereby committed to sell the land based on the terms in the letter, there is no indication in the record that they accepted the offer presented in the letter.

IV.

We reverse the judgment of the trial court and remand the case to the trial court with directions to vacate its order directing the Calloways to convey the property to Mr. Huber and Ms. Mase and to dismiss the complaint. We tax the costs of this appeal, jointly and severally, to Richard E. Huber and Debra L. Mase for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.